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No. 04-1152

In the Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents oppose the government's petition for a writ of certiorari on two grounds. First, they argue that the court of appeals reached the correct result under this Court's decisions. Br. in Opp. 9. Second, they argue that the case is not ripe for review because it arises at the preliminary injunction stage. *Ibid.* Both contentions are without merit.

The court of appeals enjoined the application of an Act of Congress by identifying a constitutional right of institutions of higher education to receive federal funding to support their educational programs, while simultaneously denying federal recruiters equal access to their students. Pet. App. 11a-15a. That holding is not only incorrect; it is inconsistent with the very decisions on which the court relied. Moreover, the condition on the receipt of federal funds that respondents challenge is modest and precisely tailored to further the government's compelling interest in recruiting the highest caliber candidates for essential military positions. The condition does not affect the relationship of an institution of higher education with anyone except the federal government itself, and it is therefore merely one aspect of their bilateral agreement. The United States is doing no more than any donor to or contractor with a university might reasonably

do: if the university wants its support for the education of the university's students, the United States wants fair treatment in return by being afforded equal access to recruit those students for future employment.

Nor should the Court delay granting certiorari until some indefinite time in the future after a final judgment has been issued by the district court, and the court of appeals has completed its review of that judgment. The Court has repeatedly granted certiorari to review court of appeals decisions that have required an Act of Congress to be preliminarily enjoined on constitutional grounds. Pet. 24. It should do so again here, particularly since the question presented concerns the power of Congress to recruit military personnel during a time of war.

A. The Solomon Amendment Is Not Subject To Strict Scrutiny

1. Respondents argue (Br. in Opp. 14) that the court below correctly relied on *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1 (1986), *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), in holding that the Solomon Amendment violates the compelled speech doctrine. In *Pacific Gas*, the Court invalidated a state commission's order that required a public utility to include the messages of another speaker in its billing envelopes. 475 U.S. at 12-16. In *Wooley*, the Court held unconstitutional a state law that required motorists to display the state motto on their license plates. 430 U.S. at 717. And in *Hurley*, the Court invalidated a state law that required a parade organizer to allow a group of individuals to display a message in the parade that the parade organizer did not wish to include. 515 U.S. at 574-581. Those decisions undermine, rather than support, the court of appeals' holding.

First, in each case, the government *directly mandated* a party to convey someone else's point of view. *Pacific Gas*, 475 U.S. at 6-7; *Wooley*, 430 U.S. at 707; *Hurley*, 515 U.S. at

561. In contrast, the Solomon Amendment does not compel anything. Institutions of higher education that do not wish to provide equal access to military recruiters may decline federal assistance. Cf. *Westside Cmty. Bd. of Educ.* v. *Mergens*, 496 U.S. 226, 241 (1990).

Second, in each of the three cases, the government directive forced a party to convey views with which that party disagreed. *Pacific Gas*, 475 U.S. at 17 (utility required to "spread[] a message with which it disagrees"); *Wooley*, 430 U.S. at 707 (parties consider state motto "to be repugnant to their moral, religious, and political beliefs"); *Hurley*, 515 U.S. at 574 (parade organizer "clearly decided to exclude a message it did not like"). That precondition for application of the compelled speech doctrine is not present here. Respondents object to the military's "Don't Ask, Don't Tell" policy. Br. in Opp. 16. But that is an objection to what the military *does* in accordance with 10 U.S.C. 654, not to any view that the Solomon Amendment seeks to promote. Neither the Solomon Amendment nor the military's recruiters seek to promote the government's point of view on the "Don't Ask, Don't Tell" policy. Instead, consistent with the objectives of the Solomon Amendment, military recruiters provide factual information on military service and encourage interested students to pursue military careers.

Third, the government directives in *Pacific Gas*, *Wooley*, and *Hurley* sought to alter what was communicated in a forum or on property that the enlisted party had dedicated to its own expression or personal use. *Pacific Gas*, 475 U.S. at 5, 17-18 (utility required to use envelope containing its newsletter and bill to disseminate opposing party's views); *Wooley*, 430 U.S. at 715, 717 n.15 (motorist required to display state motto on personal property used in his daily life and with which he was closely associated); *Hurley*, 515 U.S. at 572-573 (parade organizer required to alter expressive content of its own parade). The Solomon Amendment, by contrast, seeks to induce institutions of higher education to

give the military access to a forum that the institutions have created for outside employers whose viewpoints they do not endorse. And it concerns an economic activity—employment—that is traditionally subject to governmental regulation even in the university setting. See, *e.g. University of Pa.* v. *EEOC*, 493 U.S. 182 (1990); Pet. 12. The statute at issue in *Hurley* also created a danger that the views of unwanted speakers would be attributed to the parade organizer. 515 U.S. at 576-577. The Solomon Amendment creates no such danger. Students and the public both can readily understand that military recruiters, like all recruiters, speak for their employers, not for the institution. Cf. *Mergens*, 496 U.S. at 250-252 (opinion O'Connor, J.).

Thus, the Solomon Amendment does not have any of the characteristics that implicate the compelled speech doctrine: It does not involve compulsion; it does not seek to promote a message with which institutions of higher education disagree; it does not seek to affect what is communicated on space or property that is reserved for the institutions' own expression or personal use; and it does not create a danger of misattribution. Far from supporting application of the compelled speech doctrine to the Solomon Amendment, *Pacific Gas*, *Wooley*, and *Hurley* demonstrate that the compelled speech doctrine has no application here.

For similar reasons, respondents err in relying on *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), and *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). In *United Foods*, the Court held that mushroom growers could not be compelled to pay an assessment for generic advertising of mushrooms. 533 U.S. at 413-416. In *Abood*, the Court held that workers could not be required to pay a fee to support the ideological speech of unions. 431 U.S. at 234-235. Both cases involved a direct mandate to pay an assessment for the promotion of a viewpoint to which the assessed party objected, and the Court held that the party must have a right to opt out of the assessment. See *United Foods*, 533

U.S. at 411 (parties object to message that mushrooms are worth consuming whether or not they are branded); *Abood*, 431 U.S. at 235 (workers have right to withhold support for ideological causes to which they object). The Solomon Amendment has none of those characteristics: it does not impose a direct mandate, but rather allows educational institutions to opt out by declining federal financial assistance; it does not assess a fee; and it does not promote an objected-to viewpoint. Respondents' reliance on the principle from those cases—that a party cannot be required to subsidize private speech to which it objects—is particularly unconvincing when it is the United States that is subsidizing institutions of higher education, rather than the other way around, and when the government is seeking access that institutions already provide to other employers without charge.

Finally, respondents mistakenly rely on *Speiser* v. *Randall*, 357 U.S. 513 (1958). In that case, which the Court decided on procedural due process not First Amendment grounds, see *id.* at 517 & n.3, the Court adverted to the First Amendment issue raised by a state law that increased taxes (by withdrawing an exemption) on persons for engaging in certain speech, where the law was "frankly aimed at the suppression of dangerous ideas." *Id.* at 519 (internal quotation omitted). The Solomon Amendment does not increase the taxes of those who fail to satisfy a condition; it withholds federal funding from those who would deny equal access to federal employers. And the Solomon Amendment does not aim at the suppression of dangerous ideas; it is aimed solely at an institution's *conduct* in denying equal access to military recruiters.

2. Respondents seek to defend the Third Circuit's holding that the Solomon Amendment intrudes on the right to associate (Br. in Opp. 17-20) based on *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), and *Hurley*. Neither case, however, supports the court of appeals' extraordinary notion

that an institution may voluntarily associate itself with the government's money to obtain support for educating its students, and then turn around and claim a constitutional right not to associate with the government when the government seeks to recruit the students the institution has educated.

Dale involved a governmental intrusion on the ability of the Boy Scouts to determine its own internal leadership, and that intrusion created an unacceptable danger that scouts and the public would attribute views to the organization that it did not have. 530 U.S. at 653-654. Here, in contrast, the Solomon Amendment does not seek to prescribe an institution's leadership, and there is no danger that the public will attribute to the institution any views expressed by military recruiters. Similarly, the statute in *Hurley* required the objecting party to include an unwanted message in its own expressive activity, and there was an unacceptable danger that the unwanted message would be attributed to the objecting party. Neither of those circumstances is present here.

The Solomon Amendment does not intrude on the right to association recognized in *Dale* and *Hurley* for the additional reason that it involves a condition on federal assistance, not a regulatory requirement. If universities do not wish to associate with military recruiters, they may simply decline to associate themselves with the government's money.

The Court's decision in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), demonstrates that when a party voluntarily accepts federal money, it may not claim that the conditions on the receipt of that money violate the First Amendment right to associate. In that case, the Court unanimously rejected a college's claim that Title IX's prohibition against discrimination on the basis of sex in programs that receive federal financial assistance violated the college's right to associate. The Court explained that Congress is free to establish reasonable conditions on the receipt of federal assistance and that the college could avoid the conditions by declining federal assistance. *Id.* at 575-576.

Respondents characterize *Grove City* as resting on the conclusion that the funding condition was narrowly tailored to further the government's compelling interest in combating gender discrimination. Br. in Opp. 20. But respondents do not cite any language from *Grove City* supporting that reading, and with good reason. *Grove City* did not uphold the funding condition under heightened scrutiny. Instead, the Court upheld the condition because it did not intrude on the right to associate in the first place. 465 U.S. at 575- 576.

B. The Solomon Amendment Is Not Subject To, But In Any Event Satisfies, Intermediate Scrutiny

Respondents accuse the government of arguing that the Solomon Amendment should be subjected to intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968). Br. in Opp. 21. The government, however, does not make that argument. To the contrary, the government argues that the Solomon Amendment should not be subjected to *O'Brien*'s intermediate scrutiny standard, both because *O'Brien* applies to mandatory requirements, not to funding conditions, and because a university's denial of equal access to military recruiters involves conduct, not expression protected by the First Amendment. See Pet. 16-17.

If the Court were to conduct an analysis under *O'Brien*, however, the Solomon Amendment would readily be sustained under that analysis. Respondents argue that because the Solomon Amendment seeks to induce access for recruiting, its purpose is not unrelated to expression. Br. in Opp. 22. The proper question under *O'Brien*, however, is whether the purpose of the legislation "is unrelated to the *suppression* of free expression." *O'Brien*, 391 U.S. at 377 (emphasis added); see, *e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 662 (1994). Here, the interest underlying the Solomon Amendment—seeking equal access to recruitment opportunities to further military preparedness—is manifestly unrelated to the suppression of expression.

Respondents also seek to defend the Third Circuit's holding that *O'Brien* requires a specific evidentiary showing on the military's need for recruiting access to campuses. Br. in Opp. 23-26. But Congress is not required to conduct empirical studies before reaching the common-sense conclusion that personal access to students on campus furthers recruitment. If on-campus recruiting were not effective, employers would not seek such access, and institutions would not provide it. Moreover, by establishing a standard of *equal* access, Congress reasonably relied on an educational institution's own assessment of what degree of access prospective employers need for effective recruiting.

C. The Unconstitutional Conditions Doctrine Does Not Support The Court Of Appeals' Decision

Respondents argue that the doctrine of unconstitutional conditions renders it immaterial that the Solomon Amendment imposes a condition on federal funding, rather than a mandatory requirement. Br. in Opp. 9-13. According to respondents, under that doctrine, Congress may not seek to achieve through a funding condition what it could not command directly. *Id.* at 10. That argument is inconsistent with *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998), a case that respondents do not cite, much less discuss. In that case, the Court held that Congress has authority to establish criteria for the receipt of federal funding "that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Id.* at 588.

Congress's authority under the Spending Clause is not without First Amendment limits. But, in general, those limits are exceeded only when Congress aims "at the suppression of dangerous ideas." *National Endowment for the Arts*, 524 U.S. at 587 (citations omitted). Thus, in the only two cases cited by respondents in which the Court invalidated a federal funding condition, it did so because Congress was aiming at the suppression of ideas. *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 548-549 (2001) (viewpoint-based funding restriction on legal services violated First Amendment because "Congress'[s] antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest") (citations omitted); *FCC* v. *League of Women Voters*, 468 U.S. 364, 383-384 (1984) (law prohibiting "editorializing" by public broadcasting grantees violated First Amendment because it was motivated by "desire to curtail expression of a particular point of view on controversial issues of general interest"). The other cases relied on by respondents also involve efforts to suppress ideas. See *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830-831 (1995) (university's failure to fund religious publications was an attempt to suppress particular point of view in funding forum); *Speiser*, 357 U.S. at 519 (withholding of tax exemption was "aimed at the suppression of dangerous ideas") (citation omitted); see also *Perry* v. *Sindermann*, 408 U.S. 593, 598 (1972) (public college's refusal to renew employment contract would violate First Amendment if based on employee's criticism of college administrators). Because the Solomon Amendment seeks to induce institutions of higher education to provide equal access to military recruiters, and does not aim at the suppression of ideas, the unconstitutional conditions doctrine has no application here.

D. This Case Is Ripe For The Court's Review

Respondents suggest three reasons that the case is not ripe for review, but each is unpersuasive. Respondents first argue that the Court should not grant review because only one court of appeals has addressed the constitutionality of the Solomon Amendment. Br. in Opp. 26-27. Review is warranted in this case, however, because the government has been enjoined from enforcing an Act of Congress on constitutional grounds and because that Act concerns a matter of vital importance—recruitment of military personnel during a time of war. And respondents themselves, far from limiting this case to the Third Circuit, have given the case a far broader sweep by bringing it on behalf of law schools and

law school faculties in California and elsewhere in the Nation, as well as a nationwide association of 900 professors and individual professors both inside and outside the Third Circuit. See Pet. 7 n.2; Pet. App. 84a-86a, 103a-128a. Those considerations strongly support review in the absence of a circuit conflict, and they make it imperative that review take place now rather than at some undefined point in the future.

Second, respondents argue that review is unwarranted because this case is at the preliminary injunction stage. Br. in Opp. 27. But this Court has repeatedly granted certiorari to review a lower court decision preliminarily enjoining an Act of Congress on constitutional grounds. See Pet. 24. Respondents have noticeably failed to respond to the government's showing that this Court routinely grants review in such circumstances.

Finally, respondents argue that this case should await further proceedings because the government has not presented evidence to the district court on the need for equal campus access. Br. in Opp. 27. But no such proceedings are necessary to resolve the purely legal questions presented by the government's petition. See Pet. 25-26. If the Court agrees with the government that the Solomon Amendment should not be subjected to strict or intermediate scrutiny, or that satisfaction of intermediate scrutiny does not require the factual presentation demanded by the court of appeals, the Solomon Amendment will be sustained, and no further proceedings will be necessary.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

APRIL 2005